90-1019

Supreme Court, U.S.
FILED
DEC 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

APPENDIX

NUMBER:

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1990

IMCO, INC., AND JERRY W. IKARD D/B/A
IKARD MANUFACTURING COMPANY,

Petitioners,

V.

CURTIS R. MORTON, Commander
of the United States Defense
Contracts Administration Services
Management Area - Birmingham, etc.

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

Morris J. Brooks, Jr.
Counsel for Petitioner
9009 Randall Rd.
Huntsville, AL 35802
(205) 883-7636

STATEMENT OF CONTENTS OF APPENDIX

I certify that the contents of the appendix to be filed in conjunction with this Writ of Certiorari has been compiled in accordance with Rule 21(k) of the Supreme Court of the United States Rule and contains the following portions, and only the following portions, of the record below:

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_____

Counsel for Petitioners

1. The Order of the 11th Circuit Court of Appeals from which this Writ of Certiorari derives.

Entered October 31, 1990
Issued as Mandate November 26, 1990

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 90-7096
Non-Argument Calendar

D.C. Docket No. CV-89-P-2196-S

IMCO, INC.,
IKARD MANUFACTURING COMPANY,
JERRY W. IKARD,

Plaintiffs-Appellants,

versus

CURTIS R. MORTON, Commander of the United States Defense Contracts Administration Services Management Area -Birmingham; MICHAEL P. W. STONE, Secretary of The United States Department of the Army; MAURICE H. DEFORD as Acting Commander of The United States Army Legal Services Agency; WILLIAM K. SUTER, Judge Advocate General of the United States Department of the Army,

Defendants-Appellees,

Appeal from the United States
District Court for the Northern
District of Alabama

Before HATCHETT, EDMONDSON and COX,
Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was taken under submission by the Court upon the record and briefs on file, pursuant to Circuit Rule 34-3;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said district court in this case be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED THAT plaintiffs-appellants pay to defendants-appellees, the costs on appeal to be taxes by the

Clerk of this Court.

Entered: October 31, 1990

For the Court: Miguel J. Cortez, Clerk

By: Karleen McNabb, Deputy Clerk

ISSUED AS MANDATE: NOV 26 1990

2. The Order of the United States District Court in the Northern District of Alabama, Southern Division, dismissing Petitioner's Complaint Entered January 12, 1990

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ALABAMA

Southern Division

IMCO, INC., IKARD MANUFACTURING COMPANY, and JERRY W. IKARD,

Plaintiffs;

-vs.- Case No. CV 89-P-2196-S

CURTIS R. MORTON, Commander of the United States Defense Contracts Administration Services Management Area - Birmingham; MICHAEL P. W. STONE, Secretary of The United States Department of the Army; MAURICE H. DEFORD as Acting Commander of The United States Army Legal Services Agency; WILLIAM K. SUTER, Judge Advocate General of the United States Department of the Army,

Defendants.

OPINION

This case involves an effort by plaintiffs to void a suspension order and notice of proposed debarment, based on defendants' failure to refer the matter to the Small Business Administration. 1/ Plaintiffs Ikard Manufacturing Company ("IMC") and IMCO, Inc. ("IMCO"), are small businesses. They have performed projects under contracts with government agencies including the Army. Plaintiff Jerry W. Ikard is the owner of IMC and IMCO. The proposed debarment, if made final, would render plaintiffs ineligible for government contracts for an as-yet undetermined period. Under the terms of the suspension, currently in effect, the Army will not consider plaintiffs' bids on new contracts, and will not grant extensions on existing contracts.

The case is before the court on

plaintiffs' motion for a preliminary injunction and defendants' motion to dismiss. The court concludes that the primary issue in the case is one of law, on which defendants will prevail. Accordingly, plaintiffs' motion for preliminary injunction is to be denied, and defendants' motion to dismiss is to be granted.[2/]

In October 1989, the Army notified plaintiffs of their suspension and proposed debarment. The reason given for the action against IMC and Jerry Ikard was "the chronic failure of IMC to perform in accordance with contractual requirements." The reasons given for the action against IMCO was "its affiliation with Jerry Ikard and Ikard Manufacturing Company."

Plaintiffs argue that the suspension

and proposed debarment are contrary to the Small Business Act. Plaintiffs direct the court's attention to 15 U.S.C. 637(b)(7)(A):

> It shall also be the duty of the [Small Business] Administration and it is empowered, whenever it determines such action is necessary -- . . .
>
> To certify to Government procurement officers, and officers engaged in the sale and disposal of Federal property, with respect to all elements of responsibility, including, but not limited to, capability, competency, capacity, credit, integrity, perseverance, and tenacity, of any small business concern or group of such concerns to receive and perform a specific Government contract. A Government procurement officer or an officer engaged in the sale and disposal of Federal property may not, for any reason specified in the preceding sentence, preclude any small business concern or group of such concerns from being awarded such contract without referring the matter for a final disposition to the Administration.

The court concludes, however, that this section does not require the Army to

refer the present matter to the Small Business Administration. There are two reasons for this conclusion.

First, Section 637(b)(7)(A) is by its terms limited to Government action on specific contract, and is inapplicable to suspensions and proposed debarments. The section refers in its first sentence to a small business's responsibility to perform "a **specific** Government contract," and in its second sentence to the Government's denial of "**such** contract" to a small business. Plaintiffs argue that the statute applies, **a fortiori**, to suspensions and debarments, which implicate many contracts. On this view, it would be absurd to grant a small business lesser protection against an action which carries a greater danger of harm.

The initial appeal of this argument is dispelled by the realization that the reasons for suspension and debarment often differ from the reasons for the denial of specific contracts. In awarding specific contracts, Government procurement officers may be concerned about the present and future ability of businesses to perform the work adequately. The Small Business Act was designed, at least in part, to preclude procurement officers from assuming that small businesses, simply because of their size, would be unable to perform specific contracts. The Small Business Administration (SBA) was intended to provide expertise on the capabilities of small businesses.

Yet this expertise is irrelevant to the Army's offered reasons for the

suspension and proposed debarment of plaintiffs. Plaintiffs' suspension and proposed debarment are not based on predictions of plaintiffs' present or future performance. Instead, the Army's action is, and will be, based on its evaluation of plaintiffs' past performance. This aspect of the debarment renders Section 637(b)(7)(A) inapplicable the process.

Plaintiffs characterize debarment as a judgment that they would be unlikely to perform adequately in future contracts, and argue that this judgment can only be made by the SBA. Yet plaintiffs' argument would produce the implausible result that the Army could never suspend or debar a small business. Though the SBA is empowered to issue certificates of competency to small businesses for

specific contracts, the SBA cannot issue blanket certificates of competency such as would be needed to satisfy the Army in this case. Plaintiffs thus would have the Army refer their debarment to an agency with no authority to decide the matter. There is no indication that this extreme result was intended to follow from the Small Business Act.

Second, even if Section 637(b)(7)(A) were applicable to suspensions and debarments, it would not apply in this case. The purpose of this section of the Small business Act is to protect small businesses from governmental discrimination on the basis of their size. When government action towards a small business clearly has nothing to do with the business's size, it would be fruitless to require the involvement of

the SBA. **See NFK Engineering, Inc. v. United States,** 805 F.2d 372, 378 (Fed. Cir. 1986); **Electro-Methods, Inc. v. United States,** 728 F.2d 1471, 1476 (Fed. Cir. 1984); **Siller Brothers, Inc. v. United States,** 655 F.2d 1039, 1044 (Ct. Cl. 1986), **cert. denied** 456 U.S. 925 (1982). The suspension and proposed debarment of plaintiffs grew out of failure to perform in accordance with contractual requirements. There is no indication that the Army condones similar failures by large companies or that the Army's action is related to plaintiffs' size.[3/] Accordingly, plaintiffs' suspension and proposed debarment are not among the actions that must be referred to the SBA.

In conclusion, this court rejects plaintiffs' contention that the Army's

suspension and proposed debarment of them was invalid for failure to comply with 15 U.S.C. Section 637(b)(7)(a). Based on this conclusion, the court denies plaintiffs' motion for a preliminary injunction. Further, defendants' motion to dismiss is to be granted, as plaintiffs have failed to exhaust their administrative remedies. The court expresses no opinion on the proper outcome of the administrative proceedings with respect to plaintiffs' debarment. Moreover, this court's decision should not affect plaintiffs' right to seek judicial review of any adverse decision at the administrative level.

This the 12th day of January, 1990.

Sam C. Pointer, Jr.
United States District Judge

Footnotes:

1. This opinion will refer to defendants Curtis R. Morton, Michael P. W. Stone, Maurice H. Deford and William K. Suter collectively as "the Army". That term may also, depending on the context, encompass other government officials and employees.

2. The action is dismissed on the grounds that plaintiffs have failed to exhaust their administrative remedies. Plaintiffs argue that the debarment procedure offered by the Army is improper, and that a party is not required to pursue relief through improper administrative channels. The argued impropriety is the Army's failure to refer the matter to the Small Business Administration (SBA). For reasons explained herein, this court concludes that the Army is not required to refer the matter to the SBA. This case, therefore, does not fall within the claimed exception to the requirement of exhaustion of administrative remedies.

3. Plaintiffs contend that any failure to perform according to contract is related to size, and thus that referral to the SBA is mandated. For instance, plaintiffs argue that any delays resulted from the smallness of their workforce. This argument, however, misconstrues the nature of the Small Business Act's ban on discrimination against small businesses. The flaw in the argument can best be seen by an analogy to the Age Discrimination in Employment Act.

If an elderly person is refused a job on the docks solely because he is unable to lift the weights required, there is no discrimination on the basis of age. This is so, even if the elderly person argues that he could lift those weights if he were younger.

3. Plaintiffs' Motion for Preliminary Injunction and Hearing

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

IMCO, INC., IKARD MANUFACTURING COMPANY, and JERRY W. IKARD,

Plaintiffs,

vs. Civil Action No. _____

CURTIS R. MORTON, Commander of the United States Defense Contracts Administration Services Management Area - Birmingham; MICHAEL P. W. STONE, Secretary of the United States Department of the Army; MAURICE H. DEFORD as Acting Commander of The United States Army Legal Services Agency; WILLIAM K. SUTER, Judge Advocate General of the United States Department of the Army,

Defendants.

MOTION FOR PRELIMINARY INJUNCTION AND HEARING

Comes now the plaintiffs, IMCO, Inc., Ikard Manufacturing Company,

and Jerry W. Ikard, by and through their undersigned attorney and request this Court to issue a preliminary injunction restraining defendants from refusing to consider bids by plaintiffs on invitations for bids, requests for quotations, and solicitations and from suspending and debarring plaintiffs, based on plaintiffs' alleged lack of responsibility, without first referring the matter of responsibility to the Small Business Administration for final resolution. Plaintiffs further request that this court set a hearing on plaintiffs' Motion for Preliminary Injunction in the above-styled cause on January 19, 1990, or a sooner date at the Court's convenience.

Respectfully submitted,

Morris J. "Mo" Brocks, Jr.
9009 Randall Rd.

Huntsville, AL 35802
(205) 883-7636
(205) 828-3011

CERTIFICATE OF SERVICE

I certify that on the 29th day of December, 1989, I caused to be served a copy of the foregoing document via First Class mail, postage pre-paid, and properly addressed on Mr. Frank J. Donaldson, United States Attorney for the Northern District of Alabama, 200 Federal Courthouse, Birmingham, Alabama 35203; Richard Thornburgh, United States Attorney General, U.S. Dept. of Justice, 10th St. and Constitution Ave., Room 4400, Washington, D.C. 20530; Curtis R. Morton, Commander of the United States Army Defense Contracts Administration Services Management Area - Birmingham, 2121 8th Ave. No., Suite 104, Birmingham, AL 35203-2376; Michael P. W.

Stone, Secretary of The Department of the United States Army, The Pentagon, Room 3E 718, Washington, D.C. 20310-0100; Maurice H. DeFord, Acting Commander of The United States Army Legal Services Agency, Nassif Building, Falls Church, VA 22041-5013; William K. Suter, Judge Advocate General of the United States Army Washington, D.C. 20310-2200.

Morris J. Brooks, Jr.

4. Defendants' Motion to Dismiss

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ALABAMA

Southern Division

IMCO, INC., IKARD MANUFACTURING COMPANY, and JERRY W. IKARD,

Plaintiffs;

-vs.- Case No. CV 89-P-2196-S

CURTIS R. MORTON, Commander of the United States Defense Contracts Administration Services Management Area - Birmingham; MICHAEL P. W. STONE, Secretary of The United States Department of the Army; MAURICE H. DEFORD as Acting Commander of The United States Army Legal Services Agency; WILLIAM K. SUTER, Judge Advocate General of the United States Department of the Army,

Defendants.

DEFENDANTS' MOTION TO DISMISS

Comes now the defendants, by and through Frank W. Donaldson, United States

Attorney, and Caryl P. Privett and Marvin Neil Smith, Jr., Assistant United States Attorneys for this District, and move the Court pursuant to Rule 12(b), Federal Rules of Civil Procedure, to dismiss the Complaint in the above-styled civil action due to lack of subject matter jurisdiction, insufficiency of service of process, and failure to state a claim upon which relief can be granted.

A memorandum in support of the motion and in opposition to plaintiffs' motion for a preliminary injunction and the Affidavit of James P. Bowers are submitted herewith.

FRANK W. DONALDSON
United States Attorney

CARYL P. PRIVETT
Assistant United States Attorney

MARVIN NEIL SMITH, JR.
Assistant United States Attorney

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been served upon counsel for the plaintiffs, Morris J. Brooks, Jr., 9009 Randall Road, Huntsville, Alabama 35802, by mailing the same by first class United States mail, properly addressed and postage prepaid on this the 8th day of January, 1990.

MARVIN NEIL SMITH, JR.
Assistant United States
Attorney

5. The Complaint

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

IMCO, INC.,
P.O. Box 368
Meridianville, AL 35759-0368

IKARD MANUFACTURING COMPANY
P.O. Box 368
Meridianville, AL 35759-0368

JERRY W. IKARD
151 Becky Dr.
Meridianville, AL 35759

Plaintiffs

Civil Action No. _____

vs.

CURTIS R. MORTON, in his official capacity, Commander of the United States Army Defense Contracts Administration Services Management Area - Birmingham
2121 8th Ave. No., Suite 104
Birmingham, AL 35203-2376

MICHAEL P. W. STONE, in his official capacity, Secretary of The Department of the United States Army The Pentagon
Room 3E 718
Washington, D.C. 20310-0100

MAURICE H. DEFORD, in His
Official Capacity as Acting
Commander of The United
States Army Legal
Services Agency
Nassif Building
Falls Church, VA 22041-5013

WILLIAM K. SUTER, in His
Official Capacity as Judge
Advocate General of the
United States Army
Washington, D.C. 20310-2200

Defendants

VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Comes IMCO, Inc., a corporation located in and created under the laws of the State of Alabama; Ikard Manufacturing Company, a sole proprietorship owned, at the time of suspension, by Jerry W. Ikard, and now owned by IMCO, INC.; and Jerry W. Ikard, plaintiffs herein, by and through their undersigned counsel, and complain of Curtis R. Morton, in his official capacity as Commander of United

States Army Defense Contracts Administration Services Management Area - Birmingham; Michael P. W. Stone, in his official capacity as Secretary of the United States Department of the Army; Maurice H. DeFord in His Official Capacity as Acting Commander of The United States Army Legal Services Agency; and William K. Suter, in his official capacity as Judge Advocate General of the United States Army; jointly and severally, defendants herein, and show unto the Court as follows:

1. This civil action for declaratory and injunctive relief arises under the Administrative Procedure Act, as amended, 5 U.S.C. 701 et seq.; the Armed Services Procurement Act of 1947, as amended, 10 U.S.C. 2301-2314; the Federal Acquisition Regulations, Subpart

9.4 concerning Suspension and Debarment, and both the Department of Defense and Army Supplements to said regulations; the Small Business Act, 15 U.S.C. 631 et seq.; and the Declaratory Judgments Act, 28 U.S.C. 2201-2202.

JURISDICTION

2. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. 1331 and 1361. An actual and justiciable controversy exists between the plaintiffs and the defendants as to which the plaintiffs require an immediate and definitive declaration of their rights by this Court and both interim and permanent injunctive relief.

VENUE

3. Venue is proper in this district under 28 U.S.C. 1391(e)(1), (2) and (4).

THE PARTIES

4. IMCO, Inc., (hereinafter "IMCO") is a corporation created under the laws of the State of Alabama, and is located at Highway 231-431 North, Meridianville, Alabama. IMCO, Inc., is a fully qualified participant in the United States Small Business Administrations's program for providing contract support and business development assistance to small businesses, which provides military hardware and sophisticated weapons systems' component parts to the United States Government agencies.

5. Ikard Manufacturing Company (hereinafter "IMC") is a sole proprietorship owned and operated by Jerry W. Ikard at the time of suspension, is now owned by IMCO, Inc., and is located at Highway 231-431 North, Meridianville, Alabama. Ikard

Manufacturing Company is a fully qualified participant in the United States Small Business Administrations's program for providing contract support and business development assistance to small businesses, which provides military hardware and sophisticated weapons systems' component parts to the United States Government agencies.

6. Jerry W. Ikard (hereinafter "Ikard") is the former owner of Ikard Manufacturing Company, is the sole shareholder of IMCO, Inc., and lives at 151 Becky Dr., Meridianville, Alabama.

7. Curtis R. Morton is the Commander of the United States Army Defense Contracts Administration Services Management Area - Birmingham (hereinafter DCASMA). DCASMA administers most, if not all, of plaintiffs' contracts for

military hardware and sophisticated weapons systems' component parts. Defendant Morton is sued in his official capacity and the allegations set forth herein as to him are not limited to him individually, but extend to his supervisors and personnel working under this direction.

8. Maurice H. DeFord is the acting commander of the United States Army Legal Services Agency (hereinafter "LSA"). LSA has initiated suspension and debarment proceedings against the plaintiffs. Defendant Maurice H. DeFord is sued in his official capacity and the allegations set forth herein as to him are not limited to him individually, but extend to his supervisors and personnel working under his direction.

9. William K. Suter is the Judge

Advocate General of the United States Department of the Army (hereinafter "JAG"). JAG has initiated suspension and debarment proceedings against the plaintiffs. Defendant Suter is sued in his official capacity and the allegations set forth herein as to him are not limited to him individually, but extend to his supervisors and personnel working under this direction.

10. Michael P. W. Stone, is the Secretary of The Department of the Army of The United States of America (hereinafter "DOD"). DCASMA, LSA, and the JAG are component agencies or divisions of DOD. Defendant Morton is sued in his official capacity and the allegations set forth herein as to him A- are not limited to him individually, but extend to his supervisors and personnel

working under this direction.

FACTS

11. On or about October 19, 1989, Defendant LSA mailed letters (Exhibit A and B) advising plaintiffs they were "being considered for debarment by the Department of the Army pursuant to the authority granted by Federal Acquisition Regulation (FAR), section 9.406."

12. Said letters further advised plaintiffs that their business activities with defendants would be suspended pending resolution of the matter, to-wit: "Contractors proposed for debarment are excluded from receiving contracts, and agencies will not solicit offers from, award contracts to, renew or extent to subcontracts with these contractors, unless the acquiring agency's head or that person's designee determines in

writing that there is a compelling reason to do so. Contractors proposed for debarment are also excluded from conducting business with the Government as agents or representatives of other contractors." (emphasis added).

13. The letter to IMC and Ikard states that "The proposed debarment of you and your firm, Ikard Manufacturing Company (IMC) are based upon the chronic failure of IMC to perform in accordance with contractual requirements."

14. The letter to IMCO, Inc., states that "The proposed debarment of IMCO Inc. is based upon its affiliation with Jerry Ikard and Ikard Manufacturing Company (IMC)." No other grounds for debarment or suspension are alleged against IMCO, Inc.

15. IMCO's government contracts

performance record is good and is not a basis on which defendants rely in seeking IMCO's suspension and debarment.

16. More than 95% of the revenues of both IMCO and IMC come from contracts with various agencies of the United States government. Plaintiff have numerous contracts pending with defendants.

17. IMCO and IMC are small businesses within the meaning of the Small Business Act (15 U.S.C. 631, et. al.).

18. Defendants are required by the Small Business Act, 15 U.S.C. Section 637 (b)(7)(A), to-wit:

> (b) It shall also be the duty of the Administration and it is empowered, whenever it determines such action is necessary--
>
> (7)(A) To certify to Government procurement officers . . ., with

> respect to all elements of responsibility, including, but not limited to, capability, competency, capacity, credit, integrity, perseverance, and tenacity, of any small business concern or group of such concerns to receive and perform a specific Government contract. A Government procurement officer . . . may not, for any reason specified in the preceding sentence, preclude any small business concern or group of such concerns from being awarded such contract without referring the matter for a final disposition to the Administration. [emphasis added]

to refer plaintiffs' suspensions, proposed debarments, and exclusion from consideration of bids on particular contracts to the Small Business Administration (hereinafter "SBA").

19. IMCO has submitted bids in response to United States Department of the Army, United States Army Missile Command, invitations for bids, requests for quotations, and solicitations. The United States Army Missile Command sent letters to IMCO advising it that its bids

on DAAH01-89-B-A170 (Exhibit C), DAAH01-89-T-4825 (Exhibit D), DAAH01-89-T-5330 (Exhibit E), DAAH01-89-T-3834 (Exhibit F), DAAH01-89-T-5410 (Exhibit G), DAAH01-90-B-A011 (Exhibit H), DAAH01-89-R-A402 (Exhibit I), DAAH01-89-T-3230 (Exhibit J), DAAH01-89-B-A193 (Exhibit K), DAAH01-89-B-A316 (Exhibit L), DAAH01-90-T-0182 (Exhibit M), DAAH01-90-T-0099 (Exhibit O), DAAH01-90-B-A004 (Exhibit P), DAAH01-89-B-A155 (Exhibit Q), DAAH01-89-B-A400 (Exhibit R), DAAH01-89-B-A190 (Exhibit S), DAAH01-89-T-4304 (Exhibit T), and DAAH01-90-T-0117 (Exhibit U), would not be considered because of IMCO's suspension and pending debarment proceedings.

20. Even though defendants' suspension and proposed debarment of plaintiffs is based solely on the issue

of plaintiffs' responsibility, defendants precluded IMCO's bids from being considered on each of the foregoing invitations for bids, requests for quotations, and solicitations without referring the matter for a final disposition to the Small Business Administration.

21. Defendants, as a matter of agency and departmental policy and because of the suspension and proposed debarment of plaintiffs, are not considering any of plaintiffs' pending bids on government contracts and will not consider any of plaintiffs' future bids on government contracts.

22. Defendants, as a matter of agency and departmental policy, will not refer to the Small Business Administration any future denials by

defendants of consideration of plaintiffs' bids.

23. In the absence of defendants' referral of the issue to the SBA, defendants lack the legal authority to suspend or debar plaintiffs, lack the legal authority to refuse to consider plaintiffs' bids on individual contracts and are violating the Small Business Act.

24. By reason of the wrongful acts and the unlawful suspension and debarment of the plaintiffs by the defendants, plaintiffs have been, are now, and in the future will be illegally denied their right to contract with the United States government and its agencies and will be denied their right to seek modifications of contracts plaintiffs are now performing on behalf of the United States government.

25. As a consequence of defendants' pre-hearing suspension of the plaintiffs, the plaintiffs have been, are now, and will be suffering irreparable injury.

26. It is a system-wide agency policy of defendants to suspend and debar small business contractors without complying with the mandates of 15 U.S.C. Section 637 (b)(7)(A).

27. Plaintiffs have no adequate remedy at law and have no means for redress of wrongs they herein complain except through declaratory judgment and mandatory injunction proceedings to review the actions of the defendants and to order said defendants to cease and desist any and all suspension and debarment activities against plaintiffs until such time as defendants comply with 15 U.S.C. 637 (b)(7)(A).

STATEMENT OF ENTITLEMENT TO

INTERIM INJUNCTIVE RELIEF

28. An actual controversy exists between plaintiffs and defendants that is definitive, real, concrete and substantial and admits of an immediate and definite determination of plaintiffs' rights.

29. Defendants' refusal to consider IMCO's bids reflect a decision by defendants to disallow all of plaintiffs' bids on pending requests for quotations, invitations for bids, solicitations and the like.

30. Defendants' disallowance of past and future bids by plaintiffs on pending requests for quotations, invitations for bids, solicitations and the like is a clear and prejudicial violation of applicable constitutional,

statutory and regulatory law regarding the suspension and debarment of a federal contractor.

31. The unlawful actions of the defendants hereinabove described significantly undermine the integrity of the federal procurement process, the operation of which, in accordance with applicable federal, constitutional, statutory and regulatory law, is of substantial public interest.

32. In the absence of immediate court intervention compelling defendants to comply with the mandates of 15 U.S.C. 637 (b)(7)(A), defendants may officially debar plaintiffs as soon as January 2, 1990.

33. Plaintiffs have exhausted all mandatory administrative remedies, have no adequate remedy at law, and will

suffer immediate and irreparable harm unless the declaratory and injunctive relief prayed for herein is granted immediately.

REQUEST FOR RELIEF

WHEREFORE, plaintiffs respectfully request that the Court grant the following relief:

(1) Enter a judgment pursuant to 5 U.S.C. 706 and 28 U.S.C. 2201 and 2202 declaring defendants' action in suspending plaintiffs and in seeking a debarment of plaintiffs solely on the basis of responsibility without referring the matter to the Small Business Administration is illegal, arbitrary, capricious and an abuse of discretion and is a clear violation of 15 U.S.C. 637 (b)(7)(A) and, further, that plaintiffs' bids should not be have been excluded

from consideration on defendants' requests for quotations, invitations for bids and solicitations and should not, in the future, be excluded from consideration without the matter of plaintiffs' responsibility being first referred to the Small Business Administration.

(2) Enter preliminary and permanent injunctions enjoining defendants, their departments, employees, officers, servants, agents and other representatives, and those acting in concert with them, from engaging in further unlawful acts of termination, suspension and debarment of plaintiffs, based on plaintiffs' alleged lack of responsibility, without first referring the matter to the Small Business Administration as required by 15 U.S.C.

637 (b)(7)(A).

(c) Grant plaintiffs its costs and attorneys' fees in undertaking this action, and such other and further relief as this Court deems just and proper.

Respectfully submitted this the 29th day of December, 1989.

Morris J. "Mo" Brooks, Jr.
Attorney for Plaintiffs
9009 Randall Rd.
Huntsville, AL 35802
(205) 883-7636
(205) 828-3011

VERIFICATION

STATE OF ALABAMA

COUNTY OF MADISON

JERRY W. IKARD, being first duly sworn, deposes and says that he is the owner of Ikard Manufacturing Company and owns 100% of the stock of IMCO, INC., that he has read the foregoing Verified Complaint for Declaratory and Injunctive

Relief and knows the contents thereof, and verifies that this Complaint is true to the best of his knowledge, information and belief. Executed on this the 29th day of December, 1989.

(Signatures)

Jerry W. Ikard, individually
Jerry W. Ikard d/b/a Ikard Manufacturing Company and as sole shareholder of IMCO, Inc.

Subscribed and sworn to before me this 29th day of December, 1989.

Morris J. Brooks, Jr. /s/
Notary Public
My Commission Expires: 8-10-93

6. Lengthy Statutes and Federal Acquisition Regulations

5 U.S.C. 702. Right of Review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be

entered against the United States: **Provided,** That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or title), and their successors in office, personally responsible for compliance. . . .

5 U.S.C. 704. Actions Reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. . . .

5 U.S.C. 705. Relief pending review

. . . On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari

or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

5 U.S.C. 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not

in accordance with law;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law; . . .

15 U.S.C. 631. Declaration of Policy

(a) The essence of the American economic system of private enterprise is free competition. Only through full and free competition can free markets, free entry into business, and opportunities for the expression and growth of personal initiative and individual judgment be assured. The preservation and expansion of such competition is basic not only to the economic well-being but to the security of this Nation. Such security and

well-being cannot be realized unless the actual and potential capacity of small business is encouraged and developed. It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise, to insure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government (including but not limited to contracts or subcontracts for maintenance, repair, and construction) be placed with small-business enterprises, to insure that a fair proportion of the total sales of Government property be made to such enterprises, and to

maintain and strengthen the over-all economy of the Nation.

15 U.S.C. 637(b)(7)(A):

(b) It shall also be the duty of the Administration and it is empowered, whenever it determines such action is necessary --

(7)(A) To certify to Government procurement officers, and officers engaged in the sale and disposal of Federal property, with respect to all elements of responsibility, including, but not limited to, capability, competency, capacity, credit, integrity, perseverance, and tenacity of any small business concern or group of such concerns to receive and perform a specific Government contract. A Government procurement officer or an officer engaged in the sale and

disposal of Federal property may not, for any reason specified in the preceding sentence, preclude any small business concern or group of such concerns from being awarded such contract without referring the matter for a final disposition to the Administration.

28 U.S.C. Section 1254(1):

Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 U.S.C. 2201. Creation of Remedy

(a) In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing

of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. 2201. Further Relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

28 U.S.C. 1331

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.

28 U.S.C. 1361

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

28 U.S.C. 1391. Venue generally

(e) A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, or (2) the cause of action arose, or . . . (4) the plaintiff resides if no real property

is involved in the action.

Federal Acquisition Regulation 9.101

9.101 Definitions.

"Responsible prospective contractor" means a contractor that meets the standards in 9.104.

Federal Acquisition Regulation 9.104-1

9.104-1. General Standards.

To be determined responsible, a prospective contractor must--

(a) Have adequate financial resources to perform the contract, or the ability to obtain them (see 9.104-3(b));

(b) Be able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments;

(c) Have a satisfactory performance

record (see 9.104-3(c));

(d) Have a satisfactory record of integrity and business ethics;

(e) Have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them . . .;

(f) Have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them (see 9.104-3(b)); and

(g) Be otherwise qualified and eligible to receive an award under applicable laws and regulations.

Federal Acquisition Regulation 9.104-3

9.104-3 Application of Standards.

(e) Small Business Concerns. If a small business concern's offer that would otherwise be accepted is to be rejected because of a determination of

nonresponsibility, the contracting officer shall refer the matter to the Small Business Administration, which will decide whether or not to issue a Certificate of Competency (see Subpart 19.6).

Federal Acquisition Regulation 9.400

9.400 Scope of Subpart.

(a) This subpart--

(1) Prescribes policies and procedures governing the debarment and suspension of contractors by agencies for the causes given in 9.406-2 and 9.407-2;

Federal Acquisition Regulation 9.402

9.402 Policy.

(a) Agencies shall solicit offers from, award contracts to, and consent to subcontracts with responsible contractors only. Debarment and suspension are discretionary actions

that, taken in accordance with this subpart, are appropriate means to effectuate this policy.

(b) The serious nature of debarment and suspension requires that these sanctions be imposed only in the public interest for the Government's protection and not for purposes of punishment. Agencies shall impose debarment or suspension to protect the Government's interest and only for the causes and in accordance with the procedures set forth in this subpart.

Federal Acquisition Regulation 9.406-2

9.406-2 Causes for Debarment.

The debarring official may debar a contractor for any of the causes listed in paragraphs (a) through (c) following:

(c) Any other cause of so serious or

compelling a nature that it affects the present responsibility of a Government contractor or subcontractor.